

FILED BY CLERK

OCT 12 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0331-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
ABEL CRUZ TRUJILLO,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2009110144001DT

Honorable Arthur T. Anderson, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Catherine Leisch

Phoenix
Attorneys for Respondent

Abel Cruz Trujillo

Florence
In Propria Persona

K E L L Y, Judge.

¶1 Petitioner Abel Trujillo was convicted of aggravated assault after a jury trial. We affirmed the conviction and the slightly aggravated prison term of 12.5 years after counsel filed a brief in accordance with *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders v. California*, 386 U.S. 738 (1967); and *State v. Leon*, 104 Ariz. 297, 451 P.2d

878 (1969), and Trujillo filed a pro se supplemental brief. *State v. Trujillo*, No. 1 CA-CR 09-0748 (memorandum decision filed Jul. 29, 2010). [2010 WL 2975789] Trujillo then sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., based on claims of ineffective assistance of trial and appellate counsel. The trial court denied the petition without an evidentiary hearing and this petition for review followed.

¶2 “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). To avoid the summary dismissal of a petition for post-conviction relief raising claims of ineffective assistance of counsel, a defendant must raise a colorable claim that counsel’s performance was both deficient and prejudicial. *See State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006). “A colorable claim of post-conviction relief is ‘one that, if the allegations are true, might have changed the outcome.’” *State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (App. 2004), *quoting State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

¶3 During jury selection, a potential juror (juror three) admitted her father and brother were in prison and stated she believed this would affect her ability to be fair and impartial. When questioned privately by the trial court, juror three stated she did not think she could be fair given the fact that she believed her brother’s sentence for a drug-related offense was excessive. The court asked the prosecutor whether the state had alleged any “aggravators” for sentencing purposes and the prosecutor responded that it had. The court explained to the juror that the only role a jury could have with respect to sentencing related to these alleged aggravating factors, but that ultimately the court would decide what sentence to impose.

¶4 In his petition for post-conviction relief, Trujillo contended trial counsel had been ineffective because he had not objected after this conversation took place in front of juror three. Although juror three was excused, Trujillo argued the judge's comments resulted in "fundamental error" and trial counsel's failure to object had been prejudicial because juror three was permitted to return to the jury room where she was "free to mingle with the other jurors and discuss the judge's comments." He also argued appellate counsel had been ineffective in failing to raise this issue on appeal.

¶5 The trial court addressed Trujillo's claims in a thorough, well-reasoned minute entry in which it correctly concluded he had failed to raise a colorable claim for relief. No purpose would be served by restating the court's ruling in its entirety here. Rather, because Trujillo has failed to establish the court abused its discretion in denying the petition without an evidentiary hearing, we adopt the court's ruling. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶6 We grant Trujillo's petition for review but deny relief.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge